IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

Nos. 198, 199

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,

v.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.,
Appellees.

Nos. 200, 201

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

v.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.,
Appellees.

BRIEF FOR APPELLEES

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Statement of the Case

The appellees are duly elected, qualified and acting officials representing the State of Texas in their official capacities. The appellants, referred to as pipe line companies, have omitted essential facts and, in some instances, have misstated the facts of record.

For the purpose of clarifying these matters, appellees now set out their own statement of the case.

In the last decade the vast Texas gas fields have been converted more and more to producing cheap and convenient fuel for eastern and midwestern consumers. The gas, long used for fuel intrastate and for the production of carbon black, is now dedicated to a great extent to the use of the multi-million dollar interstate pipe lines.

The State of Texas, over a period of years, through legislative enactments, commission rulings and supervision, and the incurring of burdensome expenses, has effected gas conservation. It has been stipulated as part of this record that, except for statutory regulation, unlimited drilling of Texas gas fields would quickly drain the gas reserves dedicated by contract to the pipe line companies (R. 118). Thus unlimited drilling would put the pipe line companies out of business. The legislatures of Texas have endowed the Railroad Commission of Texas with discretionary authority to effectuate gas conservation. Mr. Murray, one of the three commissioners, testified at the trial that *one of the primary functions of the Railroad Commission was and is to assure an adequate supply of gas to the consumers within and without the State* (R. 130). In addition to the "over and under statute," which was enacted for the special benefit of the pipe line companies and their consumers, the Commission has evolved the efficient practice known as "nominations." It would not be feasible for the interstate pipe line companies to operate without either the "over and under statute" or the "nomination" procedure (R. 156).

In addition to gas field conservation practices which result in material benefits to the pipe line companies (R. 142), the Railroad Commission has been responsible for approximately a 50% increase in the supply and the reserves of gas dedicated to the pipe lines (R. 143). Not all gas is produced from gas wells. There are approximately 8,275 gas wells and 76,770 oil wells throughout Texas supplying gas to pipe lines (R. 125). It is a natural phenomenon that gas is produced during the production of oil. Gas so produced is referred to as casinghead gas. Until the State took affirmative action against oil producers who were flaring such gas, only a small portion of the casinghead gas was utilized. In many instances the Railroad Commission shut down whole oil fields in order to effect a use of this gas (R. 132). The pipe lines were the beneficiaries of this new supply and potential reserve (R. 132, 143), and they secure approximately three billion cubic feet of casinghead gas daily as a result of Railroad Commission action (R. 132).

The net result of the State's activities has been to give impetus to the construction of interstate pipe lines (R. 142). The increase in the gas available to the pipe lines assures them of a more profitable amortization of their capital investment (R. 142-143, 146), and consumers of gas are insured a continuous and non-erratic supply of fuel for a longer period of time (R. 145-146). Neither the Congress of the United States, the Federal Power Commission nor any other federal agency has assured the consumer or pipe line companies these benefits by any law, rule or regulation (R. 123).

The West Texas Hugoton Gas Field is the scene of the appellant pipe line companies' taxable activity. The gas in this field contains certain valuable liquefiable hydrocarbons, *i.e.*, gasoline, kerosene, butane, etc., which are extracted at gasoline plants. This gas is also the source from which carbon black is produced. The carbon black industry wastefully burns the gas in order to produce the carbon black (R. 188-189). The operators of gasoline plants, in the absence of the Texas conservation laws, in order to realize quick profit from larger quantities of gasoline, could produce the gas wells at 100% open flow and could flare the residue gas, thereby draining the gas from the acreage dedicated to the pipe lines (R. 146). The pipe line companies and their consumers, from the uncontradicted evidence, are the major recipients of the benefits derived from the Texas conservation laws and regulations (R. 158). Appellants' statements to the contrary are incorrect and in the face of the record. (Appellants' Br. 50-55). Contrary to appellants' assertion that the competing carbon black industry benefits along with the pipe lines from the Texas laws and regulations (Appellants' Br. 53), the established fact is that conservation is putting the carbon black industry out of business (R. 188-189).

Appellant pipe line companies purchase all of their gas at the outlet of local gasoline plants, except the portion produced by Panhandle-Eastern. Michigan-Wisconsin purchases all of its gas at the outlet of one of Phillips Petroleum Company's gasoline plants. The voluminous contracts executed between the pipe lines and the producers favor the

pipe line companies (R.51). Prominent features of these contracts are the dedication of the gasoline plants' residue gas to the pipe lines at fixed prices. These private contracts in fact prevented the State from increasing the production tax (R. 51). The Texas Legislature, solicitous of the committed producers (R. 51) and mindful of the Texas conservation laws, in lieu of an increased production tax, placed the incidence of the tax upon gas first taken or retained after the gasoline or liquid hydrocarbons are separated from the gas. The intrastate pipe line or intrastate consumer pays the same tax rate per cubic foot of gas consumed as does the interstate pipe line or interstate consumer. In fact, forty per cent of the gas gathering tax is presently being paid by the Texas consumer and sixty per cent of the tax is paid by the consumers in thirty-eight other states. Texas consumers, therefore, pay a larger proportion of the taxes collected under the Act than do the consumers in any other state. This fact alone refutes appellants' statement that the gas gathering tax was directed solely at interstate industry and at consumers in other states. Appellants have passed on to their consumers the amount of this tax. The average consumer pays less than three-fourths of one cent per month more for his gas. (This computation is based upon the amount of tax paid per month under protest [R. 4, 19] and the number of consumers [R. 2, 13].) The Court of Civil Appeals found, as a matter of fact, that this gas gathering tax was fairly commensurate with the benefits conferred by the State (R. 53).

A tax upon the producer is unquestionably valid. *Hope Natural Gas v. Hall*, 274 U.S. 284 (1927). Had the State of Texas exercised its established prerogative of increasing the tax upon the producer of the gas, the pipe line companies would have been contractually obligated to pay three-fourths of such increase (R. 255). Except for the contract binding the producer to absorb one-fourth of any production tax increase, any increase would be passed on by the producer, under ordinary industrial recoupment practices, to the pipe lines and thence to their consumers. It is elementary that if the producer is required to absorb even a part of a tax he has suffered a loss to his net profit just as if he had been required to sell the gas at a lower price. As observed in *Cities Service Gas Co. v. Peerless*, 340 U.S. 179 (1950), loss of profit to the producer would necessitate stopping production of gas at a date earlier than anticipated, ultimately resulting in waste, and adversely affecting gas conservation generally. In the companion case, *Phillips Petroleum Co. v. Oklahoma*, 340 U.S. 190 (1950), this Court upheld the validity of an Oklahoma price fixing regulation requiring the gas to be sold at a higher price so as to insure more profit to the producer and thereby further gas conservation. The *Phillips* case was concerned with the same gas field involved in the case at bar, and a good portion of this Oklahoma gas is processed at the same gasoline plants and sold together with the gas in the case at bar to these appellant pipe lines (R. 3, 16). Therefore, the Texas Legislature, by avoiding an increased production tax

which would result in a loss to the producer, has effected gas conservation just as has the State of Oklahoma by its price fixing measure.

The Phillips Petroleum Company's Hansford gasoline plant is one of the gasoline plants from which Panhandle Eastern Pipe Line Company obtains its gas. Of the gas obtained from this particular gasoline plant, 55% to 60% is produced in the State of Oklahoma (R. 16). The gas being purchased by Michigan-Wisconsin Pipe Line Company comes from the Phillips' Sherman plant, and 7% of this gas is produced in Oklahoma (R. 3). This gas which is produced in Oklahoma, processed in Texas gasoline plants, and taken or retained by pipe line companies in Texas, is not subject to the Texas gas gathering tax. But under the holding in the *Phillips* case, the sale of this Oklahoma gas at the outlet of the Texas gasoline plants is subject to Oklahoma's price fixing regulation.

The type of "gathering" tax here in litigation is not new. A similar temporary "gas gathering" tax was passed by Louisiana in 1940, and was extended every two years until made permanent in 1948. La. Gen. Statutes, 8787.18, et seq.

Jurisdictional Question

Appellee's motion to dismiss or affirm should be granted for the reason that the finding of the state court as to the operating incidence of the tax is "binding on the Supreme Court" and, in light of such finding, it is idle for appellants to contend that the tax is levied upon either of the seven events alleged by them in their protests, in that under the

Texas protest statute the only issues involved in the trial of these cases have been foreclosed by the state court's finding as to what the tax in fact is levied upon.

In our motion to dismiss or affirm we pointed out that the federal question relied upon by appellants was unsubstantial in character, in that the question urged for reversal has been plainly foreclosed by prior decisions of this Court. We now point out (1) that grounds presently relied upon by appellants in these appeals were not issues in the State courts, and (2) that every ground relied upon by appellants that was in issue in the State courts has been plainly foreclosed by the finding of the State court as to the operating incidence of the tax.

Appellants in their protest and their pleadings set out only the following grounds and reasons why they contend that this tax violates the Commerce Clause:

That the tax is levied on:

(1) "The purchase of gas for immediate transportation in interstate commerce."

(2) "The privilege of purchasing gas in interstate commerce."

(3) "The entry of gas into interstate commerce."

(4) "The activity or occupation of engaging in interstate commerce."

(5) "The act of taking gas into interstate commerce."

(6) "A movement of goods in interstate commerce during the course of such commerce."

(7) "The privilege of transporting goods in interstate commerce." (R. 7, 8, 23).*

We point out that appellants do not allege in their protests that the tax is an undue burden on interstate commerce, that it is discriminatory against interstate commerce, or that it subjects interstate commerce to a "multiple burden." In this appeal, however, they are contending that this tax is an undue burden, that it is discriminatory and that it subjects interstate commerce to "multiple burdens." These issues were not involved in the lower courts, hence such contentions are not involved on this appeal. These new grounds or reasons cannot be involved here because they were waived under the provisions of Article 7057b, the Texas protest statute.

This protest statute gives a taxpayer permission to sue the State when the taxpayer pays the taxes under protest and accompanies such payment with a written protest, "setting out fully and in detail each and every ground or reason why it is contended that such tax is unlawful or unauthorized." Suit then must be brought against the State within ninety days to recover such protested payments. This protest statute specifically provides as follows: "The issues to be determined in such suit shall be only those arising out of the grounds or reasons set forth

*The seven events listed were lifted from Michigan-Wisconsin's protest. They are identical with Panhandle-Eastern's allegations in its protest. However, Panhandle-Eastern made the following additional statements in its protest: that the tax is levied on the "retaining and continuing the transportation of gas which is in interstate commerce," and that the tax is levied upon the "retaining gas already in commerce," as to the gas that was produced by it. (R. 23.)

in such written protest as originally filed." Appellants in their written protests did not state any grounds or reasons as to why this tax violated the Commerce Clause except that it was levied upon one or more of the seven events above enumerated. We point out that they did not state as a ground or reason in their protests that this tax was an undue burden on interstate commerce or that it was discriminatory or would subject them to a "multiple burden."

The Texas courts have consistently held, in construing this protest statute, that a taxpayer cannot recover on grounds or reasons not set forth in the written protest. *Community Public Service v. James* 167 S.W. (2d) 588 (1942); *Ramsey v. Investors Div. Services*, 248 S.W. (2d) 263 (1952). This fact was recognized and relied upon as definitely limiting the scope of the question passed on in the State courts. As stated by the Court of Civil Appeals:

"That the gathering of gas, so defined, is a local activity within the State of Texas and not subject to repetition elsewhere is apparent and since *appellees do not allege the statute to be discriminatory*, the sole question is whether such local activities are so closely related to and such an integral [fol. 57] part of the interstate business of appellees who transport gas in interstate commerce as to be within the scope of the Commerce Clause of the Constitution." (R. 50).

In *Memphis Gas Company v. Stone*, 335 U.S. 80, at 84 (1948), the Court stated:

"The state Supreme Court [of Mississippi] construed the tax as 'an exaction . . . as a recompense

for . . . protection of . . . the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State. As we are bound by the construction of the state statute by the state court, it is idle to suggest that the tax is on 'the privilege of engaging in interstate business.' . . ."

Also, in *Spector Motor Service v. O'Connor*, 340 U.S. 602, at 605 (1950), the Court turned to the opinion of the State court to determine the "all-important operating incidence of the tax." In fact, this Court has consistently held that it is bound by the finding of the State court showing exactly what the State is taxing.

The State court in this case found the incidence of the tax to be:

". . . the first taking or the first retaining of possession of gas produced in Texas for transmission whether through a pipe line, either common carrier or private, or otherwise after severance of such gas, and after the passage of such gas through any separator, drip, trap, meter or other method designed to separate the oil therefrom. In the case of gas containing gasoline of liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant." (R. 50).

The State court also found that the processing of the gas, the taking or retaining of the gas and its transmission are successive and not simultaneous acts (R. 53).

In the light of the above findings it is idle to suggest or contend that the tax is levied upon either one or more of the events alleged by appellants in their protests. Appellants' only issues, as made by them in the State courts, as to why this tax violated the Commerce Clause were that this tax statute was levied upon one or more of the seven events set forth in their protest. The State Court has held that this tax act is *not* levied on:

(1) "The purchase of gas for immediate transportation in interstate commerce."
(2) "The privilege of purchasing gas in interstate commerce."
(3) "The entry of gas into interstate commerce."
(4) "The activity or occupation of engaging in interstate commerce."
(5) "The act of taking gas into interstate commerce."
(6) "A movement of goods in interstate commerce during the course of such commerce."
(7) "The privilege of transporting goods in interstate commerce;"

but is levied only on the local incidence of taking or retaining gas for further processing or transmission.

Therefore, every issue properly involved in this case has been foreclosed by the finding of the State

court as to what the State is taxing; in other words, the operating incidence of the tax. Therefore nothing remains upon which to predicate this appeal.

WHEREFORE, appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the decree of the Court of Civil Appeals heretofore entered herein.

Although appellees are thoroughly convinced that there is no merit or substance in appellants' appeal for the reason that such appeal does not properly present a question, either federal or otherwise, for this Court's determination, we will further show that on the merits the judgments of the State court should be affirmed.

Summary of Argument

1.

Although a person is engaged solely in interstate commerce, a State may validly levy a nondiscriminatory tax upon a local incident or activity of the interstate business which is separate and apart from the actual flow of commerce, provided the taxpayer is receiving from the State levying the tax, benefits, protection or opportunities which bear a fiscal relationship to the tax. Memphis Gas Company v. Stone, 335 U.S. 80 (1948); Richfield Oil Corp. v. State Board, 329 U.S. 69 (1946); Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940); McGoldrick v. Berwind-White Coal Co., 309 U.S. 33 (1940); Western Live Stock v. Board of Revenue, 303 U.S. 250 (1938).

(1) The appellant pipe line companies' statements and arguments in their brief to the effect that they receive no "benefits, protection or opportunities" from the laws and regulations of Texas are the very *antithesis* of the uncontradicted facts in the record. Appellees established in the trial of this cause that the pipe line companies were the major recipients of the benefits from Texas conservation laws and regulations. Further, it was shown without dispute that except for these conservation laws, the multi-million dollar interstate pipe line companies could not operate or exist. As a direct result of the Texas conservation measures, the pipe lines and their consumers have reaped manifold benefits and profits. The Court of Civil Appeals after thoroughly reviewing the Statement of Facts, found that "the tax levied was fairly commensurate with the protection and benefits conferred upon those engaged in the taxed occupations."

(2) The incidence of the tax is laid upon the local activity of taking gas produced in Texas for the purpose of transmission. That there is no appreciable lapse of time between processing of the gas, the taking or retaining of the gas and its transmission, is unimportant since these are *successive* and not simultaneous acts (R. 53). It is a natural phenomenon that the gas once produced from its natural storage in the earth must be kept moving. The appellants, by a facile argument attribute to that movement the term "interstate commerce," and thereby seek to avoid the fact that the taking or retaining of Texas gas in Texas is a local activity. The incidence of this gas gathering tax is entirely dis-

tinct from the incidence of a tax placed directly upon the privilege of engaging in interstate commerce. The principles involved in the case at bar are indistinguishable from those in *Chassanoil v. Greenwood*, 291 U.S. 584 (1934), *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923), and *McGoldrick v. Berwind-White Co.*, 309 U.S. 33 (1940), in which this Court upheld State tax statutes despite contentions that they were violative of the Commerce Clause of the Constitution.

(3) The tax statute, denominated "the gas gathering tax," is painstakingly drawn so that equality is its theme, both on its face and in its practical operation. The out-of-state consumer does not pay any more tax per cubic foot of gas consumed than does the intrastate consumer. The entire gas gathering tax statute manifests an evident intent that there be no discrimination between out-of-state consumers, inter se, or between out-of-state and intrastate consumers .The fact that some producers of gas do not sell the gas to transmitters, but transmit their own produced gas, requires the tax to be levied on the "taking or retaining" rather than upon the sale *in order that all "takers" and all consumers of gas bear their fair share of the tax imposed as a recompense for the benefits afforded by the State.*

(4) There is no possibility of the gas gathering activity taxed by the State of Texas being validly taxed by other States; hence, upholding the validity of this tax could not lead to a "multiple burden" on interstate commerce. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). The activity taxed

and the benefits bestowed by the State of Texas could not occur in or be bestowed by any other state. All the events upon which the tax is conditioned, the production of the gas, the separation of the gasoline and liquid hydrocarbons from the gas, and the first taking at the outlet of the processing plants, occur in Texas and nowhere else.

(5) Appellants in their brief, by the use of isolated quotations torn from the proper perspective of their individual judicial settings, have challenged the controlling authorities and constitutional principles which uphold this tax statute.

(6) The reasoning and rationale of the Court's opinion as well as the dissenting opinion in the recent case of *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952), clearly validates this gas gathering tax as not being an undue burden on interstate commerce.

Summary of Argument

II.

There are many decisions by the Supreme Court of the United States that would support a holding that interstate commerce does not begin until after the gas has been "taken" and has thereafter begun its final journey out of this state. Chassanoil v. Greenwood, 291 U.S. 584 (1934); Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923).

ARGUMENT

I.

Controlling Principle

Although a person is engaged solely in interstate commerce, a state may validly levy a nondiscriminatory tax upon a local incident or activity of the interstate business, which is separate and apart from the actual flow of commerce, provided the taxpayer is receiving from the state levying the tax, benefits, protection or opportunities which bear a fiscal relationship to the tax. Memphis Gas Co. v. Stone, 335 U.S. 80 (1948); Richfield Oil Corp. v. State Board, 329 U.S. 69 (1946); Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940); McGoldrick v. Berwind-White Coal Co., 309 U.S. 33 (1940); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938).

Appellants, throughout the trial and appellate proceedings in the state courts, were dogmatic in their assertion that the benefits afforded them could never warrant the levy of a state tax upon any part of their interstate business. In their brief in this Court, the pipe line companies, for the first time, recognize the soundness of the above-stated controlling principle (Appellants' Br. 46). This controlling principle is applicable to the Commerce Clause. It is controlling in the present instance because the evidence establishes that the appellants receive benefits, protection and opportunities bearing a fiscal relationship to the tax and because this

tax is nondiscriminatory and is laid upon a local incident or activity.

Appellants would relegate and limit the application of the above-stated principle to those cases wherein the State's power to tax has been attacked as violative of the Due Process Clause. Appellees submit that appellants' position is not supported by the cases. In *Memphis Gas Co. v. Stone, supra,* the State of Mississippi levied a franchise tax upon an interstate pipe line company whose only activities in the State were the maintaining and manning of its pipe line and the operation of a pump station. The tax was attacked on the ground that it violated the Commerce Clause. This Court held the Mississippi franchise tax valid. The opinion by Mr. Justice Reed stated the following reason for so holding:

> "We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, *gives protection* and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business." (335 U.S. at 96) (Emphasis supplied.)

The dissenting opinion recognized the above principle, but the dissentors were of the opinion that there were, in fact, no benefits.

In *Richfield Oil Corp. v. State Board, supra,* the Court held a California retail sales tax violative of

the Import-Export Clause of the Federal Constitution. The Court discussed the Commerce Clause and its relationship to state-enacted taxes.[1] This discussion expunges appellants' theory that this Court

[1] "The two constitutional provisions, while related, are not coterminous. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. Brown v. Maryland, 12 Wheat. 419; Crew Levick Co. v. Pennsylvania, 245 U.S. 292. But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether the article was, or had ever been, an import or export. See Hooven & Allison Co. v. Evatt, 324 U.S. 652, 656-66, and cases cited. Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limitation upon the power of the States, even in absence of action by Congress. Southern Pacific Co. v. Arizona, 325 U.S. 761; Morgan v. Virginia, 328 U.S. 373. But the scope of the limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. As recently stated in McGoldrick v. Berwind-White Coal Mining Co., supra, p. 48, the law under the Commerce Clause has been fashioned by the Court in an effort 'to reconcile, competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.' *That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits* (see e.g. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254-55, and cases cited; McGoldrick v. Berwind-White Coal Mining Co., (supra) and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue burden on it. Adams Mfg. Co. v. Storen, 304 U.S. 307; Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434; Best & Co. v. Maxwell, 311 U.S. 454; Nippert v. Richmond, 327 U.S. 416." (329 U.S. 75-76) (Emphasis supplied.)

does not consider the benefits received by the taxpayers when the constitutional complaint is based on the Commerce Clause.

(1) As found by the State Court, this tax is fairly commensurate with the protection and benefits conferred by the state upon those engaged in the taxed occupation.

The opinion of the Court of Civil Appeals sets out its finding that the gas gathering tax is fairly commensurate with the protection and benefits conferred upon the Appellant pipe line companies.[2]

These companies claim they do not receive any special benefits from the Texas conservation laws except indirectly. Appellees will show from the record that the undisputed and unchallenged evidence is contrary to the pipe line companies' claim.

The evidence discloses that the very economic existence of the appellants and other interstate pipe line companies is dependent upon the privileges, benefits and oportunities afforded the pipe line companies by the State of Texas. The evidence shows that Texas, in the enforcement of its oil and gas conservation laws, has made it economically possible for these appellants to be in business and to remain in business for many years to come. The fact is undisputed that if such oil and gas conservation laws

[2] "We believe that the tax levied by this statute is fairly commensurate with the protection and benefits conferred by the State upon those engaged in the occupation described." (R. 53.)

were repealed or if there were no enforcement of such laws, those engaged in the business of transmitting gas, especially the interstate transmission of gas, would lose their investments. In addition, there would be a great suffering on the part of the consumers of such gas in that their source of supply would last but a short time.[3]

It is difficult to reconcile appellants' statements that they receive no special benefits with the testimony of Mr. Murray, a qualified and recognized petroleum engineer and a member of the Railroad Commission of Texas. Mr. Murray testified that the recipients of the maximum benefits of the Texas conservation laws are the pipe line companies.[4] It

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[3] Commissioner Murray's undisputed testimony was, in part, as follows: "A. If all the oil and gas conservation laws were repealed or there was no enforcement of the laws, the effect on these pipelines, in my judgment, would be to cause great loss of investment. I don't think any of the recently built pipelines which have not been paid out would ever be amortized, and there would be also a great suffering on the part of the consumers who are dependent upon these sources of supply of gas. While that is a very great concern to us, it may not be material here, and I base that opinion both on my predictions of what would happen and my recollection of what was happening before the laws were passed and the regulations enforced." (R. 145-6.)

[4] "A. Well I would say obviously the maximum benefit would be at the outlet of the plant, because the plant itself operates under the Commission's conservation regulations, and benefits accrue from these regulations of the operation of the plant, and so my answer the point at which the maximum benefits occur would be after the gas has been finally processed through the plant, at the outlet of the plant." (R. 158.)

Note: The above reference to benefits is to benefits derived from enforcement of the conservation laws. The pipe line companies take the gas at the outlet of the plant referred to in the above testimony.

is also difficult to reconcile appellants' contention with Mr. Murray's statements to the effect that except for the conservation statutes and regulations presently in effect, no major outlay of capital for the construction of interstate pipe lines would be feasible (R. 156).

Further, the State's efforts in behalf of conservation have made available to the pipe lines a new source of supply—the casinghead gas resulting from the production of oil from 76,770 oil wells in Texas. These wells presently make available to the pipe lines an additional three billion cubic feet of casinghead gas *daily* (R. 132).

Appellants in an attempt to convince the Court that they receive no benefits from the conservation and proration statutes of Texas state on page 50 of their brief that:

"The Texas statute by which the conservation of oil and gas is accomplished shows on its face that it was enacted for the purpose of preventing waste and protecting the correlative rights of producers (among themselves) by compelling ratable production. The history of the industry shows that such statutes and regulations issued thereunder are for the protection of producers *against each other* in order that all producers may have an opportunity to produce their fair shares of the total quantity of recoverable oil and gas in a common pool. . . ."

Then, on pages 52-53, the following erroneous statement appears:

"However, the pipe line companies are not the special beneficiaries under these laws. They receive

incidental benefits from the prevention of waste, as do all other purchasers of gas. *But they benefit not at all from the proration regulations.* The producers benefit primarily and principally from the prevention of waste; and they alone benefit from proration. . . ." (Emphasis added.)

The proration statutes assure appellants that producers (other than producers of gas for appellants) in the gas field from which appellants obtain their gas will neither waste nor voraciously produce gas for their own purposes, thereby draining the underground gas from the acreage dedicated to the appellants (R. 146). Except for the proration statute, appellants, who are receiving the full amount of their delivery capacity, would have to "stand by" and watch the drainage of their dedicated gas acreage.

Each appellant has but one pipe line in which to transmit the gas after taking possession of it. The proration law limits the producers in appellants' gas field to a production rate of 25% of the daily open flow capacity of each well (R. 91, 92). In the absence of this limitation, the only way appellant pipe line companies could secure their fair share of the gas in the common pool would be to build additional pipe lines. The cost of a pipe line is from sixty to seventy-five thousand dollars per mile (R. 215). Considering the distance between the gas field and appellants' markets, each additional pipe line would require an investment of over one hundred million dollars. These facts are only a part of the evidence refuting appellants' statements.

The three-member Railroad Commission of Texas is the agency empowered by the Texas Legislature

to administer the extensive conservation laws governing the oil and gas industry that is utilizing the most valuable resources of the State. The Railroad Commission has conducted these functions for more than thirty years. Mr. Murray, a member of this Commission, testified that one of the primary functions of the Railroad Commission is to assure the consumers *without the State,* as well as consumers within the State, an adequate supply of gas available to them at all times (R. 130).

Appellants make the unsupported statement in their brief that the carbon black industry benefits by the conservation laws to the same extent as appellants. The simple truth is that the carbon black plants are appellants' competitors for the gas in the West Texas Hugoton Gas Field. And the evidence is clear that carbon black plants do not benefit from conservation laws but that such laws are putting them out of business.[5]

That the Texas Legislature in passing this tax act believed that the pipe lines and their customers were receiving benefits and protection from the State, is evidenced by the fact that the Legislature exempted

[5] Mr. Murray testified that: "The channel black plants say conservation is about to put them out of the picture." (R. 188.)

". . . They [carbon black plants] don't actually benefit. It would seem reasonable to say they would, but the very conservation that would make more gas available for the carbon black plants, enables the pipe lines, by paying a high price, to take it away from the carbon black plants, and pretty soon the carbon black plants are going, the channel black plants are going out of business. They are not building any new ones. They are just waiting for the old ones to wear out." (R. 189.)

gas taken for the manufacture of carbon black—an industry which is injured rather than benefited by Texas conservation policies.

(2) The incidence of the tax is the local activity of taking gas, which is distinct and separable from the transmission as found by the state court when it stated that the processing of the gas, the taking of the gas and the transmission of the gas are successive and not simultaneous acts. (R. 53).

The tax act defines gathering as "the first taking or the first retaining of possession of gas produced in Texas for other processing or transmission." Under the plain language used in the statutory definition of "gathering gas," the taxable incident is the taking or retaining of the gas *for* the purpose of other processing or transmission. Gathering gas does not mean the first taking or retaining *and* the transmission of the gas. It is clear that the tax is levied only upon the privilege of engaging in the business of taking or retaining gas produced in Texas for the purpose of other processing or transmission. The State court held this to be the operating incidence of the tax (R. 50). The tax is due even though the gas is in fact never transported, as long as it was taken or retained for that purpose.

This Court has held that a sale or transfer of possession of goods immediately after or immediately prior to an interstate shipment is a local activity which can be segregated from the transportation movement and made the operating incidence of a State tax. *McGoldrick v. Berwind-White Co., supra; Chassanoil v. Greenwood, supra; International Har-*

vester Company v. Department of Treasury, 322 U.S. 340 (1944); *Department of Treasury v. Wood Preserving Corp.*, 313 U.S. 62 (1941).

The local activity in the present case is the taking of possession of the gas; in fact, the operating incidence of the tax as to gas taken is the transfer of the possession of the gas. It is elementary that the delivery of personal property, that is, the taking possession thereof, is a constituent element of a sale. As pointed out, in the last preceding paragraph, this Court upon numerous occasions has permitted sales or transfers of property, both within the state of origin and the state of destination to be segregated for the purpose of state taxation, although technically in interstate commerce. If the whole sale can be segregated and made the operating incidence of a tax, we can conceive of no reason that would prevent a segregation for state tax purposes of a necessary and constituent element of the sale. In the *Berwind-White* case, *supra*, at 52, this Court stated: "As we have often pointed out, there is no distinction in this relationship between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements." One of the powers incident to ownership of property is the right to take possession.

The cases of *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923), and *Chassanoil v. Greenwood*, 291 U.S. 584 (1934), clearly reveal that a taking of possession of goods for immediate transmission in interstate commerce is a taxable activity.

As pointed out above, the statute in this case is denominated a "gas gathering tax." The tax is levied upon every person engaged in gathering gas produced in the State of Texas. The statute defines "gathering gas" to mean the *taking* or retaining of gas for the purpose of further processing or transmission. The state court has found that the taking of the gas and its transmission are successive and not simultaneous acts (R. 53). The incidence of the tax is upon the taking of the gas. That the gas is later transmitted interstate by appellants does not mean the tax is based upon this later transmittal. Gas taken for later intrastate transmission is taxable, and so is any gas taken for the purpose of transmission *even though never actually transmitted either intra or interstate.*

In the *Oliver Iron Mining Company* case, the taxpayer contested the validity of a Minnesota tax levied upon the mining of iron ore. The Court upheld the validity of the tax against the taxpayer's contention that it violated the Commerce Clause and held that the mining was an intrastate function. The only mining activity of Oliver Iron Mining Company was the taking of the ore from open pits by the use of a steam shovel, which shovel immediately transferred the ore into empty railroad cars.

The Oliver Iron Mining Company made the identical contention appellants make in this case. The Oliver Iron Mining Company claimed that the taking of the ore by the steam shovel and the placing of the ore into the empty railroad cars were simultaneous acts and that all of this operation constituted interstate commerce. As in the case at bar, the Iron Com-

pany established that the ore, while still a part of the ground, had been contracted and destined for an interstate movement. The Oliver Iron Company performed the same two activities the appellants perform: the taking and the transportation of a natural resource to fill existing contracts with consumers without the State. The incidence of the Minnesota tax and the incidence of the tax in this case is upon the taking of the natural resource. The Court, in the *Oliver Iron Company* case, stated that there was a practical continuity of movement of the ore but recognized that the mining, which under the facts constituted merely the taking of the ore, was separate and apart from the interstate transportation. The Court held that the tax on mining (taking) was a wholly intrastate function subject to state taxation.

Appellants admit, under the caption "Question Presented" on page 4, that they perform two activities: the receiving of gas and the immediate transportation of gas in interstate commerce.[6] That the Texas statute uses the term "taking' 'of gas rather than a term such as "receiving" or "purchasing" of gas is of no significance except that the term "taking or retaining" was selected for the purpose of preventing an inequitable distribution of the tax among *the out of state and intratstate consumers* (*infra*, p. 33). The taking or receiving or buying of a natural resource or product within any state

[6] Appellants' brief recites: ". . . for the privilege of *receiving* gas into their pipe lines within the State for immediate *transportation* in interstate commerce. . ."

is not a fictitious intrastate activity. It is real and is recognized by the cases decided by this Court.

Appellants, on page 29 of their brief, state that the principle involved in the case at bar is in no wise different from the principle involved in a case in which a carrier receives possession of cotton at the platform of a compress. This court has spoken on this proposition. In *Chassanoil v. Greenwood*, 291 U.S. 584 (1934), a Mississippi city levied a tax upon the business of *buying* cotton. The taxpayer, Chassanoil, bought the cotton after it came off the compress. The cotton, prior to its purchase, had been contracted for interstate delivery; and, of the cotton so purchased, a portion of it went immediately into *interstate* transporation and the remainder later went into *interstate* commerce as per prior contract. Chassanoil contended that the cotton was in interstate commerce from the moment it was purchased by him. He contended that at the time of the purchase the cotton was destined for shipment to other states and that the tax was on the privilege of engaging in interstate commerce. That some of the cotton went immediately from the compress into interstate shipment in the *Chassanoil* case can not be denied. But the Court recognized the local activity of buying, which, under the facts, constituted a taking of the cotton, as distinguished from the transportation, and upheld the tax.

Appellees submit that there is no constitutional difference between the local activities of "taking" or "buying." The term "taking" was used in this gas gathering tax act for the sole purpose of assuring an equitable distribution of the tax among the

consumers of the gas, whether intra or interstate. The use of the terms "buy," "purchase" or "receive" would not and could not assure an equitable distribution among the users of gas (*infra* p. 33).

(3) This tax statute does not discriminate against interstate commerce either on its face or in its practical operation in that equality is the theme.

Appellants in their brief filed in this Court raise for the first time the issue that the gas gathering tax is discriminatory and subjects them to a "multiple burden." This contention is now the basis for their argument that the tax is an undue burden on interstate commerce (Appellants' Br. 30-38). This effort is a belated attempt to inject issues of discrimination and "multiple burden" when there is no legal justification for this Court to consider them. These issues were waived under the provisions of Article 7057b, Vernon's Civil Statutes, the Texas protest statute.

This protest statute gives a taxpayer permission to sue the state when the taxpayer pays the taxes under protest and accompanies such payment with a written protest, "setting out fully and in detail each and every ground or reason why it is contended that such tax is unlawful or unauthorized." Suit then must be brought against the state within ninety days to recover such protested payments. This protest statute specifically provides as follows: "The issues to be determined in such suit shall be only those arising out of the grounds or reasons set forth in such written protest as originally filed." Appel-

lants in their written protests did not state as a ground or reason for protest that this tax was discriminatory or would subject them to a "multiple burden." (R. 6, 7, 8, 23, 24.) The Texas courts have consistently held, in passing upon this protest statute, that a taxpayer cannot recover on grounds or reasons not set forth in the written protest. *Community Public Service v. James*, 167 S.W. 2d 588 (1942); *Ramsey v. Investors Div. Services*, 248 S.W. 2d 263 (1952). Neither did either appellant allege in its petition that this tax was discriminatory or that it subjected interstate commerce to a "multiple burden." (R. 1-9, 11-26.) This fact was recognized and relied upon as definitely limiting the scope of the question passed on in the state courts. As stated by the Court of Civil Appeals:

"That the gathering of gas, so defined, is a local activity within the State of Texas and not subject to repetition elsewhere is apparent and *since appellees do not allege the statute to be discriminatory*, the sole question is whether such local activities are so closely related to and such an integral [fol. 57] part of the interstate business of appellees who transport gas in interstate commerce as to be within the scope of the Commerce Clause of the Constitution." (R. 50.) (Emphasis added.)

We submit that the issues of discrimination and "multiple burden" have been waived by appellants and that such issues are not properly before this Court. However, appellees will now show the Court that the gas gathering act does not in fact discriminate against interstate commerce either on its face or in its practical operation. On page 35 of this brief

we will demonstrate that this taxing act does not subject interstate commerce to a "multiple burden."

This Court has uniformly held that certain types of state taxes, if permitted to stand, would so impede or destroy interstate commerce as to call for their condemnation as forbidden interference. Such are the taxes which impose a levy for the privilege of engaging in interstate commerce. See *Spector Motor Service v. O'Conner*, 340 U.S. 602 (1951); *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947). Likewise forbidden are taxes which discriminate against interstate commerce. *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952); cf. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). An unapportioned gross receipts tax is discriminatory against interstate commerce in that it subjects interstate commerce to multiple burdens. *Gwin, White & Prince v. Henneford*, 305 U.S. 434 (1939). Such taxes impose a burden, which intrastate commerce does not bear, merely because interstate commerce is being done, thus placing it at a disadvantage in comparison to intrastate business. See *McGoldrick v. Berwind-White Co.*, 309 U.S. 33 (1940).

The present tax as applied to appellants is without the possibilities of such consequences. In fact, equality is its theme It does not aim at or discriminate against interstate commerce. It is laid upon *every* taker of gas which is produced in Texas, at the outlet of processing plants, for the purpose of further processing or transmission, regardless of whether the gas is thereafter transported in intrastate or in-

terstate commerce. Its only relation to commerce arises from the fact that immediately following such taking or transfer of possession, the gas will move in either intrastate or interstate commerce. *Chassanoil v. Greenwood*, 291 U.S. 584 (1934).

The use of the terms "taking," "take," or "retain" by the Legislature, rather than "sale" or "purchase" are used to prevent inequality. The Legislature was cognizant of the fact that in the gas industry some pipe line companies produce and retain the gas for transmission as well as purchase gas produced by others. Panhandle Eastern Pipe Line Company, one of the appellants, is such a pipe line company in that it both produces and purchases gas. Michigan-Wisconsin Pipe Line Company, the other appellant, does not produce any part of the gas it transports. Thus it is evident that had the tax been levied upon the "purchase" or "buying" of Texas gas, the tax would have created an inequality not only between appellants but also between their respective consumers. A large portion of the gas taken by Panhandle Eastern is produced by Panhandle Eastern and would never be taxed under a purchaser's or buyer's tax statute. Whereas, Michigan-Wisconsin Pipe Line Company would have to pay a tax on all the gas it acquired for the reason that it purchases all of its gas. The efforts of the Texas Legislature to do equity is conspicuously ignored by these appellants.

It has long been settled that a state can levy an occupation tax graduated according to the volume of business done. *Freeman v. Hewitt*, 329 U.S. 249 (1946). In like manner, this tax is measured by the volume of gas taken or retained. The amount of gas

taken or retained determines the degree of the privileges and benefits received, and the amount of the tax is fixed in the same proportion. The facts reflect that forty cents of each tax dollar is presently paid by local consumers, and that the consumers of thirty-eight other states pay the remaining sixty cents (R. 126). Do these facts logically support appellants' contention that the tax was "furtively directed" at interstate commerce? There is no attempt, "furtive" or otherwise, by the State of Texas to make interstate commerce bear the burdens of the State's local government. The conservation and proration laws result in benefits and protection for the intra and interstate "takers" alike. Under this statute they are taxed alike. This Court has stated that even interstate business must pay its way. *Western Live Stock v. Bureau of Revenue supra*, at 254. Appellants emphasized in their brief that every penny they paid in taxes, except insignificant amounts, came from out-of-state consumers. Appellees find no fault with this statement except that it is an attempt at deception. All the gas taken by the appellants, except insignificant amounts, was consumed by out-of-state consumers. The converse of their statement is equally true: Every penny collected from intrastate pipe lines comes from intrastate consumers.

Appellants contend that this tax is a regulation of interstate commerce because a member of the Texas House of Representatives declared that the act would tax gas that goes out of Texas and give as much protection as possible to Texas industries. But the validity of a tax statute does not depend upon what is said about it or the motive which impelled it. *Heisler v.*

Thomas Colliery Co., 260 U.S. 245, 258-259 (1922). In that case the taxpayer made the same contention based upon a declaration of the governor (presumably to the legislature) concerning the effect of the tax upon consumers in other states. The Court answered this contention as follows:

"We are unable to discern in the fact any materiality or pertinency, nor in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a State impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it. . . ."

(4) This tax statute does not subject interstate commerce to a "multiple burden" because the local activity taxed does not take place in any state except Texas.

To give rise to a multiple burden the *same*, not similar, activities must be subject to taxation by more than one state. *Gwin, White & Prince v Henneford*, 305 U.S. 434 (1939.) Other states may be able to tax local activities within their borders if they afford sufficient protection, benefits or opportunities to such local activities. But other states can not tax the local activity taxed by this statute because it is wholly performed in Texas. It is only where more than one state has a sufficient relationship to the *same* activity whereby each state could tax that activity that a "multiple burden" problem arises.

In *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604 (1938), a case involving a state tax on the energy used in a compressor station on an interstate pipe line, the "multiple burden" argument was made. This Court, in rejecting the argument, declared that each state through which a pipe line passes could lay a tax on the use of engines for the production of power but that such tax by other states would not be multiple taxation, citing *Western Live Stock v. Bureau of Revenue, supra.* The Court further stated that such a tax by other states would not be a tax on the same activity either in form or in substance, but would be a different tax on a different and wholly separate subject matter with no cumulative effect by reason of the fact that interstate business was being done.

In the case at bar, no other state could validly levy a tax upon the first taking or retaining of the gas in question because it is inconceivable that any other state could afford special benefits, opportunities or protection to this activity which is wholly performed within Texas.

(5) Appellants rely and base their whole case upon isolated quotations torn from their judicial settings.

Appellants, by the use of isolated quotations, cited out of context and torn from the proper perspective of their individual judicial settings, have challenged the controlling authorities and established constitutional principles which uphold this tax statute. Since it would unduly lengthen this brief to discuss all

these quotations in the light of their judicial settings, we will consider only those cases chiefly relied upon by appellants.

The quotation From Nippert v. Richmond, 327 U.S. 416 (1946).

Appellants, on page 23 of their brief, set out a long quotation from *Nippert v. Richmond* in an attempt to show that a local activity can not be carved out for tax purposes from what is an entire or integral economic process. This case involved the constitutionality of a municipal ordinance imposing a tax upon the solicitation of business in the City of Richmond. The city contended that the act of solicitation was a local incident taking place wholly within the City of Richmond, and that the tax was valid since it was not levied upon the privilege of engaging in interstate commerce. The Court in the quoted portion of the opinion merely pointed out that not every local incident could be carved out of the process of interstate commerce, but only those which do not strike down or discriminate against interstate commerce. The Court discussed the long line of "drummer" cases and invalidated the Richmond tax on the ground that taxation of the right to solicit business in interstate commerce was inherently discriminatory as against interstate commerce. It stated that the small operator particularly, and more especially the casual and occasional one from out of the state, would find the tax not only burdensome but prohibitive, with the result that interstate commerce would be stopped before it was even

begun. Clearly this result discriminated against interstate commerce.

But in deciding the *Nippert* case the Court pointed out that there was no lack of power in the state or its municipalities to see that interstate commerce bears with local trade its fair share of the cost of local government, the benefit and protection of which it enjoys on a par with local business. As heretofore observed, this gas gathering tax calls upon interstate trade to bear only its fair share of the cost of local government as a recompense for the benefits and protection which it enjoys. And by its terms local business is taxed in the same amount and in the same manner.

This Court in the *Nippert* opinion at page 427 also pointed out that a solicitation tax inherently bore no relation to the volume of business done. Yet appellants in their brief actually complain of the present tax because it is directly proportioned to the volume of gas taken.

Quotations from Puget Sound Stevedoring Co. v. Tax Comm., 302 U.S. 90 (1937), and Joseph v. Carter and Weekes Stevedoring Co., 330 U.S. 422 (1947).

Appellants have picked out isolated quotations from these "stevedoring" cases in an attempt to show that the thing taxed was, in fact, the taxing of "taking possession" of goods for interstate commerce. Appellants further use these quotations to try to show that the loading of a ship by stevedores is analogous to the taking possession of gas at the outlet of processing plants for the purpose of load-

ing pipe lines. This Court invalidated the occupation tax upon the business of "stevedoring" in both the *Puget Sound* and *Carter & Weekes* cases on the ground that it was levied upon the privilege of engaging in interstate transportation. If this gas gathering tax were laid upon the local incident of taking possession of gas *and* the transportation of the gas, then these two "stevedoring" cases would be in point. However, this gas gathering tax is laid only upon the local incident of taking possession of gas for the purpose of further processing or transmission.

In the *Carter & Weekes* case, the prior holding of the Supreme Court in the *Pudget Sound* case was re-affirmed by a five to four divided court. In both of these "stevedoring" cases the incidence of the tax was upon the actual transportation itself, *i.e.*, the actual movement of goods in interstate commerce. The Court pointed out that the stevedores not only took possession of the goods but actually transported the goods between the dock and the hold of the ships, and that such transportation in reality constituted the first or last leg of an interstate journey.

The fact that the taxes in the "stevedoring" cases were upon the actual transportation itself, as contrasted with a tax upon the privilege of taking possession of gas for the purpose of other processing or transmission, makes the cases distinguished by this Court in the *Carter & Weeks* opinion the controlling authorities in the case now before this Court.

The quotation from Spector Motor Service v. O'-Connor, 340 U.S. 602 (1952).

Appellants, on page 43, quote out of context the following excerpt from the *Spector* opinion:

> ". . . There is not only reason but long established precedent for keeping the Federal privilege of carrying on exclusively interstate commerce free from state taxation."

Using the above quotation as a spring board, they arrive at the conclusion that "the court has consistently held that the state can not lawfully impose a tax for the privilege of carrying on an activity that is a part of commerce." (Appellants' Br. 44.)

Spector Motor Service was a Missouri corporation engaged exclusively in interstate trucking. The State of Connecticut levied a tax upon its franchise for the privilege of carrying on or doing business within such state. The Connecticut State court in passing upon its own tax act as applied to Spector, unequivocally held that the incidence of the tax was upon Spector's franchise for the privilege of carrying on exclusively interstate transportation in the state. The Connecticut court also found: "There is no ground upon which the tax can be said to rest upon the use of highways by motor trucks." [7] The language and the rationale of the *Spector* opinion clearly reveal that if the Connecticut court had found that the tax was laid upon the privilege of "taking possession" of goods for transportation over

[7] 135 Conn. 56-57.

the highways of Connecticut as a recompense to the state for furnishing "benefits" of using the state's highways, this Court would have upheld the tax.

The *Spector* case first reached this Court by way of certiorari (322 U.S. 720) but was then remanded to the Federal District Court with directions to retain the case pending the determination of proceedings to be brought in the state court to ascertain the incidence of the tax. 323 U.S. 104. Of course, this Court knew at that time that Spector was engaged exclusively in interstate commerce. This Court would not have been interested in having the Connecticut court find the incidence of the tax, if no tax whatsoever could be levied upon a local incident which is a part of interstate commerce. If no tax could be levied upon a local incident which is a part of interstate commerce, then this Court, in lieu of remanding the case to await such determination, would have invalidated the tax. But it was not until after the Connecticut court concluded that the Connecticut tax was placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the state, that this Court declared the tax to be invalid on the ground that it was a direct tax on the "privilege of carrying on or doing business in that State."

Insofar as the case now before this Court is concerned, the following statement at page 609 of the majority opinion becomes highly significant:

". . . The State is not precluded from imposing taxes upon the other *activities* or *aspects* of *this busi-*

ness which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory." (Emphasis added.)

The Supreme Court stated that other *activities* or *aspects* of *this business*—Spector's business—could be taxed by the state, although Spector was engaged only in interstate commerce. The other activities or aspects of Spector's business that could be taxed were necessarily local or intrastate activities of that business, such as taking possession of goods for transportation over the highways of Connecticut. Yet these taxable local activities or aspects are also component parts of the interstate business of Spector.

Likewise, this gathering tax is laid upon a local activity or aspect of appellants' business—the first "taking or retaining" possession of gas for the purpose of other processing or transmission. We submit that this local activity or aspect of appellants' business, unlike the privilege of doing interstate business, is subject to the taxing power of the State of Texas.

(6) The reasoning and rationale of the opinion of the Court as well as the dissenting opinion in the recent case of Memphis Steam Laundry v. Stone, 342 U.S. 389 (1952) clearly validates this gas gathering tax as not being an undue burden on interstate commerce.

The most recent case decided by this Court dealing with the question of a state tax on local activities challenged on the basis that the commerce clause invalidated the state tax is *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952).

The State of Mississippi laid a tax upon the privilege of soliciting business for a laundry not licensed in that state. The Memphis Steam Laundry operated a laundry and cleaning establishment in Memphis, Tennessee. In serving the area surrounding Memphis, it sent ten of its trucks into Mississippi counties where its drivers picked up, delivered and collected for laundry and cleaning and solicited new customers. The tax statute in question levied a tax of $50.00 per truck on vehicles used by persons soliciting business for a laundry not licensed in the State of Mississippi while it levied a tax of only $8.00 per truck on vehicles used by persons soliciting business for laundries that were licensed in the State of Mississippi. The opinion, written by Mr. Chief Justice Vinson, with only one member of the Court dissenting, states:

"In passing upon the validity of a state tax challenged under the commerce clause, we first look to the 'operating incidence' of the tax. The Mississippi act requires a 'privilege license' and imposes a 'privilege tax' upon appellant's and employees 'soliciting business.' The Mississippi Supreme Court described the tax as follows: '. . . the tax involved here is not a tax on interstate commerce, but a tax on a person soliciting business for a laundry not licensed in this State, a local activity which applies to residents and non-residents alike.' The state may determine for itself the operating incidence of its tax. . . .

"It would appear from portions of the opinion of the court below that the tax is laid upon the privilege of soliciting interstate business on the theory that solicitation of customers for interstate commerce is a local activity subject to state taxation. However, the opinion below may also be read as construing the statutory term 'soliciting' more broadly, thereby resting the tax upon appellant's activities apart from soliciting new customers in Mississippi, mainly the pick-up and deliveries of laundry and cleaning on regular routes within the state. *Each construction of the statute raises different considerations* . . ." (342 U.S. 391-392.) (Emphasis added.)

This Court then stated, in effect, that it was not necessary to send the case back to the lower court for clarification as to the operating incidence of the tax since the tax would violate the commerce clause under either reading of the statute. The Court further stated that "whether or not solicitation of interstate business may be regarded as a local incidence of interstate commerce, the Court has not permitted state taxation to carve out this incidence from the integral economic process of interstate commerce." The court cited as authority *Nippert v. Richmond*, 327 U.S. 416. The Court in the *Nippert* case clearly stated that it had not permitted state taxation to carve out the local incidence of solicitation from the integral economic process of interstate commerce for the reason that the "drummer" taxes were inherently discriminatory against interstate commerce. In the foregoing quotation from the *Memphis* case, the Court clearly recognized that a local incidence other than solicitation, although a part of interstate com-

merce, may be carved out from the integral economic process of interstate commerce for the purpose of state taxation.

The Court stated that if the incidence of the tax was not upon the solicitation but was upon the picking up and delivering of the laundry, the "peddler" cases would apply, observing that the Court had previously sustained state taxation in the "peddler" cases on the ground that local sale and delivery of goods is an essentially intrastate process. Appellees can see no distinction between the "picking up" of laundry and the "taking possession" of gas.

Moreover, this Court struck the tax down in the *Memphis Steam Laundry* case not for the reason that the picking up, that is the taking, was not a proper local incidence that could be segregated for taxation purposes, but for the reason that the tax act in question was discriminatory as against interstate commerce, in that interstate commerce would have to pay $50.00 per truck while intrastate was subjected to only $8.00 per truck.

There is no possibility of discrimination in the application of the tax now before the Court. "Taking" possession of gas is no less a local aspect or incident of the interstate business of shipment of gas than is the "picking up" of laundry to an interstate cleaning and laundry business. The reasoning used by this Court and the rationale of the *Memphis Steam Laundry* opinion clearly demonstrates the validity of this gas gathering tax.

Appellants submit that the reasoning and holdings in the several cases discussed herein necessarily lead

to the conclusion that the local activity of "taking" or "retaining" possession of gas is a local taxable activity even if such taking and retaining is a part of interstate commerce.

II.

There are many decisions by the Supreme Court of the United States that would support a holding that interstate commerce does not begin until after the gas has been "taken" and has thereafter begun its final journey out of this state.

The point where intrastate commerce ends and interstate commerce begins is an area of "nice distinctions." In *Hood v. Dumond*, 336 U.S. 525, 568 (1949), Mr. Justice Frankfurter's dissent includes an interesting discussion of tax cases decided by the Supreme Court. He states that there has been an increasing recognition of the state's interest in seeing that interstate commerce "pays its way" and a consequent disposition to classify the object of the tax as intrastate.

There are many decisions by this Court that would support a holding that interstate commerce does not begin until after the gas has been "taken" and has thereafter begun its final journey out of the state.

We respectfully refer this Court to our discussion of *Chassanoil v. Greenwood*, *supra*, at page 29, and *Oliver Iron Mining Co. v. Lord*, *supra*, at page 27. See also *Coe v. Errol*, 116 U.S. 517 (1885); *Utah Power and Light Co. v. Pfost*, 286 U.S. 165 (1931); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245

(1922); *Edelman v. Boeing Air Transport*, 289 U.S. 249 (1932).

Conclusion

In deciding this case, of course, this Honorable Court will consider the purpose of the Commerce Clause to protect interstate commerce from discriminatory or destructive state action. At the same time the Court will properly consider the function of state taxation and the necessity that state government have taxing power by which to require interstate commerce to bear its fair share of state tax burdens.

In the light of the uncontradicted benefits bestowed upon appellants and their consumers by the State of Texas, and the finding of the state court that the "all important operating incidence of the tax" is a local activity which does not discriminate against interstate commerce, we can conceive of no adequate ground for holding that the present tax is a regulation which the Commerce Clause forbids.

Appellees respectfully submit that the incidence of this tax is upon a local activity, separate and apart from the flow of commerce; that the tax is not levied upon the privilege of engaging in interstate commerce; that the tax is not discriminatory either on the face of the statute or in its practical operation; and that in return for the special benefits bestowed upon appellants and their consumers, they should be made to pay their own way, to the same extent as intrastate pipe lines and their consumers. Appellants have eagerly accepted and freely enjoyed the manifold advantages and benefits bestowed upon

them by the State of Texas. This Court should not give its sanction to their familiar claim, so often heard at taxpaying time, that interstate commerce is of such a "spiritual" nature that it cannot be made to pay its own way.

WHEREFORE, this appeal should either be dismissed or the judgments of the court below should be affirmed.

Respectfully submitted,

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